In The

Supreme Court of the United States

October Term, 1961

No. 25

James R. Carter, *Petitioner*

vs.

United States of America, *Respondent*

Joe S. Floyd, *Petitioner*

vs.

United States of America, *Respondent*

James M. Hicks, *Petitioner*

vs.

United States of America, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

———

TO: The Honorable, The Chief Justice of the United States and Honorable Associate Justices of the Supreme Court of the United States.

The Petitioners respectfully pray that a Writ of Certiorari issue to review the judgement of the United States Court of Appeals for the District of Columbia Circuit entered on the 30th day of June, 1960, affirming a judgment of conviction against them heretofore entered in the Trial Court.

OPINION BELOW

The opinion of the United States Court of Appeals is not yet reported, but is known as numbers 15,627; 15,628; and 15,629; consolidated in that Court, and was rendered on the 30th day of June, 1960. The opinion of the lower appellate Court is set forth in the Certified transcript of record submitted herewith. The opinion and judgment are also set forth in appendix (a) and (b) hereof.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit for which review is being sought is dated the 30th day of June, 1960. On the 1st day of August, 1960, Associate Justice Hugo L. Black entered an order extending the time to file Petition for Writ of Certiorari herein to and insluding August 20, 1960. The jurisdiction of this Court is invoked under Section 1254 of Title 28 of the United States Code and Rule 37 (b) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

I

Whether the petitioners' constitutional rights to due process and to a fair trial were violated when a government witness, who was an experienced police officer, unnecessarily stated from the witness stand, in the hearing and presence of the jury, that a co-defendant (who was not on trial) had pleaded guilty earlier to the principal offense charged in the indictment.

II

Does probable cause under the Fourth Amendment of the United States Constitution exist for the arrest of persons who enter a licensed public establishment because prior to their entry, police officers in the execution of a search warrant for the violation of the lottery laws, had

discovered certain numbers paraphernalia concealed in a portion of the premises and had also discovered some numbers material on the person of the licensee, who was present in the premises when the police arrived.

III

Did the trial Court's instruction regarding that part of Section 22-1501 of the District of Columbia Code, which makes the possession of numbers material prima facia evidence of a violation of the Section, violate the petitioners' constitutional right to due process because the said instruction imposed a burden of proof on the petitioners that they were not required to carry; and because it gave the evidence a force and effect that it did not possess.

CONSTITUTIONAL PROVISION, STATUTES, AND RULES INVOLVED

PROVISIONS OF THE UNITED STATES CONSTITUTION:

Fourth Amendment:

The rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment:

No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life,

liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

PROVISIONS OF THE DISTRICT OF COLUMBIA CODE, 1951 ED. (as amended):

SECTION 22—1501. Lotteries—Promotion—Sale of Possession of Tickets.

If any persons shall within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting, or advertising directly or indirectly, any policy lottery, policy shop, or any lottery, or shall sell on transfer any chance, or right, or interest, tangible, in any policy, lottery, or any lottery, or shall sell for transfer any ticket, certificate, bill, token, or other device, purporting or intended to guarantee or assure to any person or entitle him to a chance of drawing or obtaining a prize to be drawn in any lottery, or in a game or device commonly known as policy lottery or policy transfer, or have in possession for the purpose of sale or transfer, a chance or ticket in or share of a ticket in any lottery or any such bill, certificate, token, or other device, he shall be fined upon conviction of each said offense not more than $1,000.00, or be imprisoned not more than three years, or both. The possession of any copy of record of any such chance, right, token, or other device shall be prima facie evidence that the possessor of such copy of record did, at the time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or advertising a policy lottery, policy shop, or lottery.

Section 22-1502. Possession of Lottery or policy tickets.

If any person shall, within the District of Columbia knowingly have in his possession or under his control any record, notation receipt, ticket, certificate, bill, slip, token, paper or writing, current or not current, used or to be used in

violating the provisions of Section 863, 865 or 896 of this Act, he shall, upon conviction of each such offense, be fined not more than $1,000.00 or be imprisoned for not more than one year, or both. For the purpose of this section, possession of any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing shall be presumed to be knowing possession thereof.

Section 22-1505. Permitting table or device to be set up.

(a) Any house, building, vessel, shed, booth, shelter, vehicle, enclosure, room, lot, or other premises in the District of Columbia, used or to be used in violating the provisions of section 863 or 865 of this Act, shall be deemed "Gambling premises" for the purpose of this section.

(b) It shall be unlawful for any person in the District of Columbia knowingly, as owner, lessee, agent, employee, operator, occupant, or otherwise, to maintain or aid or permit the maintaining of any gambling premises.

FEDERAL RULES CRIMINAL PROCEDURE:

RULE 8, Joinder of Offenses and Defendants

(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 13. Trial Together of Indictments or Informations.

The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information.

RULE 14, Relief from Prejudicial Joinder.

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

RULE 41, Search and Seizure

. . . . . .

(e) Motion for return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to unlawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court

in its discretion may entertain the motion at the trial or hearing.

STATEMENT OF THE CASE

The three petitioners before this Court were charged along with one Yancy Peterson and one Phillip Fludd in a seven count indictment with violations of the District of Columbia lottery laws. (Title 22, Sections 1501, 1502 and 1505 of the District of Columbia Code, 1951 Edition, as amended). The only Count of the indictment which was common to all of the defendants below was Count One thereof, which concerned itself with the charge of the operation of a lottery.

The petitioners were arrested with many other persons, by police officers of the District of Columbia on September 26, 1958 in the basement of premises 2023 Benning Road, N. E. The premises was a licensed shoe shine parlor-variety store.

A United States Commissioner's search warrant had previously been obtained for the premises together with three arrest warrants. These warrants were issued on the basis of an affidavit sworn to by Officers Jack Evans and Tarver J. Thomas, Jr. None of the arrest warrants concerned any of the petitioners.

The sufficiency and legality of the search warrant including the legality of its execution as well as the legality of the arrests of the petitioners was challenged in some measure prior to trial and quite fully on oral motions made during the course of the trial. The motions were denied at all stages.

The Government in putting on its case for the prosecution, called as its first witness, Officer Tarver J. Thomas, Jr., of the Gambling Squad of the Metropolitan Police Department. He testified that he was assigned to investigate a complaint concerning gambling activities at 2023 Benning Road, N. E., and that as a result, he began making

observations of the premises on September 2, 1958. He watched the premises again on September 3, 16, 22, 23, and 24, 1958. During these observations he saw people entering the basement of the premises and leaving after a few minutes. During his observations, he saw the petitioner, Carter about the place and the defendant, Phillip Fludd. He also saw a person named Yancy Peterson (reputed to have been a numbers pickup man) enter with bulging pockets on a couple of occasions and leave after about five minutes without the bulge. He also saw a person named Allen Morris (known to him as a numbers man) enter the premises with bulging pockets several times. Significantly, he never saw the petitioners, Joe Fludd or James Hicks during the period of his observations. Afterwards, the officer secured a search warrant for the premises and arrest warrants for Peterson, Morris, and Phillip Fludd.

Officer Robert G. Kissner testified at the trial that he went to premises 2023 Benning Road, N. E., on September 26, 1958, in the company of other officers for the purpose of executing the search and arrest warrants; that upon arrival, at the rear of the premises, he observed that the back door was open; they entered the premises through the open door; that as he entered, he observed the petitioner, Carter, standing near the doorway of the storage room; that he immediately arrested Carter and searched him and took from his person alleged number slips, cards, some money and a note book. That later Government Exhibit numbered three (numbers material) was found inside a drawer of the desk which was near where Carter had been standing when the officers entered;[1] that while they (the officers) were in the premises many persons were arrested; that to his knowledge, only two persons were not arrested.

Officer Ward C. Foulkes, who was in the raiding party, testified concerning the arrest of the petitioner, Hicks. He

[1] "Lottery" materials were also found in the pocket of a coat on the premises and in some trash.

said that Hicks entered the rear of the premises by the back door at or about 3:00 P.M.; that he then arrested and searched him, and obtained from his left sock Government's Exhibit numbered four and five (lottery materials).

Lieutenant William G. Foran (who commanded the raiding party) testified: that he and several other officers at or about 2:30 P.M. on September 26, 1958, entered the rear part of the basement of 2023 Benning Road, N. E., through an open door; that before entering, he announced that they were the police and had a search warrant but he admitted that they did not wait to be admitted; that Carter was arrested immediately upon their entry; that he arrested the petitioner Joe Fludd as he entered the premises by the rear door; that he took from his person Government's Exhibit number eight ($140.41 in money) and some lottery materials.

The records in this cause show that Peterson was indicted along with these petitioners, as was Phillip Fludd; but Allen Morris was not. Phillip Fludd was acquitted at the trial by the Jury on Count Seven and the remaining charges against him were dismissed by the Government. Yancy Peterson had pleaded guilty prior to the time of the trial of these petitioners in the Court below.

In the course of the Government's case, Officer James B. Mills was called as a witness by the Government. He had been a member of the Gambling and Liquor Squad since 1953. He was present at the time of the execution of the warrant for the premises at 2023 Benning Road, N. E., on September 26, 1958; and was called as a government witness to testify about the identity of certain objects that were seized at the time of the raid and the continuity of their possession to the time of the trial. On cross-examination of this witness by counsel for the petitioners he was asked whether he searched any of the persons who were arrested during the raid. He testified that he did search

some of the persons there. The following next occurred: (by petitioner's counsel)

"Q. . . . Did you search the individuals, yourself?

"A. Some I did.

"Q. Do you now know how many you searched?

"A. I couldn't tell you how many of the 18 that was searched that day that I searched, but I remember one I did search: Yancy Peterson, who pled guilty to operating a lottery earlier in this case."

Defense counsel immediately requested a bench conference, whereupon the following colloquy took place:

"The Court: You asked the question.

"Defense Counsel: My question didn't call for that answer.

"The Court: I will instruct the jury on it. Do you want to move for a mistrial?

"Defense Counsel: Yes, sir.

"The Court: I will deny it and I will instruct the jury.

. . .

"The Court: Ladies and gentlemen of the jury, the last answer of the Officer concerning Peterson will be stricken from the record and the jury is not to consider it in any way, shape or form. The jury is to put it completely from their minds. It has nothing whatever to do with this case. Would you (to counsel) like anything further?

"Defense Counsel: No, Your Honor."

The defense offered testimony out of the presence of the jury which was substantially as follows: the petitioner, Joe S. Fludd, testified that on September 26, 1958, he went to premises 2023 Benning Road, N. E., for the purpose of obtaining a coca cola; that he entered the front, that as he entered the premises to go to the coke machine an officer exhibited his badge to him and ordered him to the rear; that after he had been taken to the rear, he was searched by one of the officers; that they took Government's Exhibit number nine from his person.

The petitioner James M. Hicks testified that he went to 2023 Benning Road, N. E., on September 26, 1958; that he

went there to get a shoe shine; that when he went into the front door and stepped upon the shoe shine stand, an officer exhibited a badge to him and told him to go into the back which he did; that when he arrived in the back, he was searched and the contents of Government Exhibit number five was taken from his person.

The defense then called as a witness, Mr. Edward J. Bivens, an employee of the Department of Public Welfare for the District of Columbia, and Mr. Bivens testified: that about 3:00 or 3:30 P.M. on September 26, 1958, he was on his way home; that he had a slight headache and for that reason he stopped and went into 2023 Benning Road, N. E., for a "Seven-Up" that after he drank the Seven-Up, he started out of the premises and an officer exhibited his badge and told him to go into the back, at which time he asked "for what" and was told that "this is a raid," that he was then ushered into the back of the premises and was kept there; that he was searched and his billfold was taken and they took things out of his pocket; that he observed that there were about 30 people in the back; that the officers seemed to be taking notes and searching people and writing down different things; that after he had been taken back, other persons were brought in and searched; that all that he had on him was his identification and things like that; that notwithstanding, he was arrested, taken downtown; and, as he states "he was taken downtown, and they taken my picture and all of that."

The next witness called by the defense was Mr. George F. Carter who testified: that he had just gotten off from work and had stopped to go to a nearby place to pay for his pants at which time he decided to go to 2023 Benning Road, N. E., to get a shoe shine; that enroute he met one Joseph Wheeler and that they walked along together; that when they got to the premises they asked "where is everybody at"; that at that time they were both grabbed and were told "this is a raid" and then they were told to go

into the back room; that when they arrived there the man who arrested them stated "here are two more for you"; that at that time they were taken back where there were 20 or 25 other people and searched; that thereafter he and Wheeler were placed in a patrol wagon and taken to headquarters where they were written up, fingerprinted and then let go.

The defense then renewed the motions attacking the legality of the searches, seizures and arrests. The renewed motions were denied.

Thereafter, the Court instructed the jury. In so doing, the Court said in regard to the offense charged in Count One (violation of Section 22-1501):

> "In order to convict on this charge, the law does not require actual proof that the defendant was operating or participating in the operation of a lottery. The law provides as follows:
>
> "'The possession of any copy or record of any such chance, right, or interest, or of any such ticket, certificate, bill, token or other device shall be prima facie evidence that the possessor of such a copy or record did at the time and place of such possession keep, set up or promote or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting or advertising a policy lottery, policy shop, or lottery.'"
>
> "In other words, if it is shown that a defendant has numbers slips or other records, relating to a lottery in his possession, that constitutes evidence that he participated in operating the lottery, unless there is proof to the contrary.
>
> "Consequently, the jury has a right to find a verdict of guilty on a charge of operating the lottery from the fact that a person is found in possession of numbers slips or any other records of the lottery, unless the contrary is shown."

The jury returned a guilty verdict as to each of the petitioners in respect to each Count of the indictment in which they were charged. Thereafter, the Court imposed the sen-

tence against each of them of nine to twenty-seven months Count One and nine months on each of the other Counts to run concurrently with the sentence of Count one. An appeal to the United States Court of Appeals for the District of Columbia Circuit duly followed.

REASONS FOR GRANTING THIS WRIT OF CERTIORARI

ARGUMENT

1. By way of concise argument, the petitioners address themselves to each of the respective questions posed, urging each as a reason for the allowance of Writs of Certiorari. Your petitioners have not been able to find a decision from this Court that deals with the basic principle of law involved in question one. However, the principle that it is prejudicial error for the jury in a criminal case to learn of a co-defendant's plea of guilty, except when the co-defendant is called as a witness and testifies about his guilt, has been firmly established in the Third Circuit (*United States* v. *Toner*, 1949, 173 F 2d 140 and *Minder* v. *United States*, 1936, 85 F 2d 425), the Second Circuit (*United States* v. *Hall*, 1950, 178 F 2d 853) and the Eighth Circuit (*Nigro* v. *United States*, 1941, 117 F 2d 624). The District of Columbia Circuit itself has held, in two cases, that an accused has a right to be tried solely on the evidence against him rather than on the admission of another's guilt and that it was error to prejudice him in this right. *Paulton* v. *United States*, 1955, 222, F 2d 794 and *Gaumer* v. *United States*, 1957, 247 Fed. 583 F 2d.) So, it seems there is no question that the utterance of the witness, Officer Mills, at the trial below that a codefendant had pleaded guilty was prejudicial to the constitutional rights of the petitioners; and that this error standing alone was sufficient grounds for a new trial.

The trial court's admonition to the jury "not to consider it in any way shape or form" does not diminish the error. The Circuit Court of Appeals, in its written opinion (p. 3),

says that, "in light of the overwhelming evidence of guilt . . . any prejudice which may have remained despite the judge's admonition to the jury may be said to be harmless." This reasoning, even if internally consistent, ignores and diminishes the greater right of the petitioners not to have the jury's consideration tainted by improper evidence. In support of the proposition that the prejudice, if any, was harmless because of the overwhelming evidence of guilt, the Circuit Court cites three decisions from this Court: *Delli Paoli* v. *United States*, 352 U.S. 232; *Opper* v. *United States*, 348, U.S. 84; *Hopt* v. *Utah*, 120 U.S. 430. But, these three cases, do not, singlely or together, go the distance of holding that an admonition to the jury to ignore and disregard evidence that was *not admissible for any purpose* cures the prejudice caused by its admission. An admixture of "overwhelming evidence of guilt" with the unwholesome admission of improper evidence seems, to these petitioners, to be a substance that the judicial mind cannot unblend to the point of saying when one begins and the other ends.

Further, in this connection petitioners urge that the "overwhelming evidence of guilt" alluded to by the Circuit Court of Appeals is not as overwhelming as the bare reading of the Court's opinion might tend to indicate. For, it must be remembered that the said overwhelming evidence consisted of numbers slips seized from the petitioners, which seizures petitioners hereinafter attack as being unconstitutional in Point 2 of this petition. The instant case is not like many other lottery cases where the police had made many observations on the activities of the defendants and where bets had been placed with the defendants. Here, it is to be noted that as to petitioners Hicks and Fludd, the police had made no observations of them, no bets had been placed with them and they were unknown to the police as persons engaged in the lottery game.

Morover, the government's evidence of "operating a

lottery" was based on the provision of the D. C. Code (22-1501) that possession of number slips is prima facie evidence that the possessor was engaged in the operation of a lottery. This proposition is attacked by petitioners in Point 3 herein. Can it be then said that evidence of the character referred to above is so overwhelmingly conclusive of guilt as to make the error of the trial Court harmless? Petitioners submit that the answer is no.

2. The arrests of the petitioners Hicks and Fludd and the subsequent search of their persons were had in violation of their rights under the Fourth Amendment of the United States Constitution and the objects and things seized from them should have been suppressed as evidence by the trial Court. *Weeks* v. *U.S.* 232 U.S. 383. It is to be remembered that these two petitioners were arrested as they entered the basement shop at 2023 Benning Road, N. E. police officers were there in connection with the execution of a search warrant for the premises that had previously been issued by the United States Commissioner. Immediately upon arrival the officers had arrested and searched the appellant Carter who was there. They next searched the premises and found numbers material in a desk drawer, under some trash, and in a pocket of a coat that was in a chair. These seizures had been completed when the petitioners Hicks and Fludd arrived at the premises. Nevertheless, the officers arrested and searched them. *United States* v. *Di Re*, 332 U.S. 581.

As to the appellants Hicks and Fludd the search of their persons was unreasonable within the meaning of the Fourth Amendment. Since the search of their person followed their arrest it must, therefore, depend upon the validity of their arrest. There was no arrest warrant extant for either of them, nor did the officers have probable cause to believe that the petitioners Hicks and Fludd had committed any offense. *Brinegar* v. *U.S.*, 338 U.S. 160. Neither of them had been seen previously, during the time that the premises

were under observation by the police, to come and go from the place.

These two petitioners were not the only persons arrested as they entered the store. The evidence at the trial showed that at least 18 persons were arrested as they came into the building. Two of these persons testified at the trial that they had come to the building to make purchases in the store and that they were seized by the Officers, searched, taken to a Police Precinct, fingerprinted and released. The only good reason that suggests itself as to why they were released was because, unlike the petitioners, no incriminating numbers material was found on them.

The arrest of all these persons in wholesale lot, including the petitioners Hicks and Fludd, is demonstrably illegal when one considers the status of those who were arrested and subsequently released without any charge having been placed against them. The arrests of these persons were patently illegal, without justification and consequently the seizure of the petitioner's property was had in violation of the rights under the Fourth Amendment to the United States Constitution.

3. The petitioners call this Court's attention to trial Court's instruction on the part of Section 22-1501 relating to the conclusion or inference that is given to the possession of lottery materials. It is contended that this portion of the Court's instruction was erroneous because it: (a) imposed a burden on the appellants which they were not required to carry; and (b) gave the evidence a force and effect which it did not possess.

The error regarding the Court's instruction on "prima face evidence" becomes all the more consequential to the petitioners Hicks and Fludd when it is remembered that there was no evidence that any of them had been seen to come and go from the premises where they were arrested. None of them were identified as one of the persons with "bulging pockets" who was seen coming into the premises

during the course of the officer's observations. Again, none of these petitioners were known by reputation to the officer, as were others arrested and charged in this case. No bets had been placed or made with any of the petitioners prior to their arrest. The most damaging evidence against each of them was their possession of numbers material at the time of their arrest. It was thus all important that the trial judge carefully and properly instruct the jury about the effect and force of this possession as it related to Count One of the indictment.

The court's statement that "the jury had a right to find a verdict of guilty on a charge of operating the lottery from the fact that a person is found in possession of number slips or any other record of lottery, unless the contrary, is shown" gives undue force and effect to the weight of the possession of number slips. The statement omits to tell the jury that they are at liberty, if they see fit, to find a verdict of not guilty of operating a lottery on such evidence. Especially, if upon consideration of all of the evidence, and upon a further consideration of the presumption of guilt, they have a reasonable doubt as to their guilt of operating a lottery. The failure to give the jury an instruction on the matter that is evenly balanced and which informs the jury of their right to not convict on the basis of this evidence deprives the petitioners of their essential rights to due process.

It is not sufficient in meeting this contention of the petitioners to say that in other parts of the Court's charge the jury had been instructed about the presumption of innocence and about reasonable doubt. The decided cases say without equivocation that the principles of reasonable doubt and presumption of innocence must be given in connection with the presumptive evidence rule. The case of *Ward* v. *United States*, (3rd Cir., 1938) 96 F 2d 189 and *State* v. *Bryant*, 245 N. C. 645, 97 S. E. 2d 264 and cases discussed there at 97 S. E. 2d, page 266, stand for this proposition.

The trial Court's charge was erroneous for the additional reason that it had the effect of shifting the burden to the petitioners of acquitting themselves instead of upon the government to convict them. This occurred in the instant case by virtue of the Court telling the jury in effect that bare possession of "number slips or other records" was sufficient upon which to base a conviction, "unless there is proof to the contrary." This instruction violates the well settled rule of law that "it is manifest that no burden or duty is imposed on the defendant merely because a statutory rule of evidence has come into play," *State* v. *Bryant*, 97 S. E. 2d at page 266. See also: *Bulman* v. *United States*, (1938) 8 Cir., 94 F. 2d 197, 199; *Lurding* v. *United States*, (1950) 6 Cir., 179 F. 2d 419, 422; *Duncan* v. *United States* (1928) 7 Cir., 23 F. 2d 3, 4; *Gunnoe* v. *United States*, 34 F. 2d 12; *McAdams* v. *United States*, (1934) 8 Cir., 74 F. 2d 37; *Ezzard* v. *United States* (1925) 8 Cir., 7 F. 2d 808, 811.

The petitioners also urge that the full significance of the error of the Court's charge becomes clearly apparent when one considers that the Court by its instruction to the jury granted them license to convict the petioners of several distinct and independent charges on the same evidence which was, as to them, the bare possession of so-called numbers paraphernalia. It is submitted that the evidence in its total effect, if believed beyond a reasonable doubt, constituted evidence only of the violation of the possession statute which is a misdemeanor and therefore was not available as evidence in respect of the felony. Moreover, we seriously question whether evidence which relates totally to a specific count of the indictment, such as the case at bar, may be engaged as sole proof of another count in the same indictment. See *Plummer* v. *United States*, 189 F 2d 19; *Gavieres* v. *United States*, 220 U.S. 337, 58 L. Ed. 489, *Spies* v. *United States*, 317 U. S. 492, 87 L. Ed. 419; and *Berra* v. *United States*, 351 U. S. 134, 100 L. Ed. 1016.

CONCLUSION

In view of the importance of the questions here discussed to the orderly administration of the criminal law in the Federal Judicial System, it is prayed that this Court grant this petition and issue the Writ of Certiorari to review the case below.

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APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,627

JAMES R. CARTER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 15,628

JOE S. FLUDD, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 15,629

JAMES M. HICKS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeals from the United States District Court
for the District of Columbia

Decided June 30, 1960

Mr. John A. Shorter, Jr., with whom *Mr. Curtis P. Mitchell* was on the brief, for appellants. *Mr. Marion C. George, Jr.*, also entered an appearance for appellants in Nos. 15,627 and 15,628.

Mr. Maurice R. Dunie, Assistant United States Attorney, with whom *Messrs. Oliver Gasch*, United States Attorney, and *Carl W. Belcher*, Assistant United States Attorney, were on the brief, for appellee.

Before BAZELON, BASTIAN and BURGER, Circuit Judges.

PER CURIAM: Appellants and others not involved in these appeals, were charged with violations of the District of Columbia gambling laws. They were found guilty as charged, sentence was imposed, and these appeals followed.

The principal point raised on appeal is whether it was error for the District Court to refuse to grant a motion for mistrial where, during the course of the trial, it was brought to the attention of the jury that one of the co-defendants (one of those not involved in these appeals) had pleaded guilty to the felony count of the indictment, 22-1501 D. C. CODE, which jointly charged said co-defendant, appellants herein, and another.

The fact of the co-defendants' plea was brought to the attention of the jury in the course of defense counsel's cross examination of a government witness. This witness, a member of the Gambling and Liquor Squad, Metropolitan Police Department, participated in the arrest of the principals in this case. Upon questioning in regard to the search of certain individuals arrested, the following transpired:

> "Q. . . . Did you search the individuals, yourself?
>
> "Some I did.
>
> "Q. Do you now know how many you searched?
>
> "A. I couldn't tell you how many of the 18 that was searched that day that I searched, but I remember one I did search: Yancey Peterson, who pled guilty to operating a lottery earlier in this case."

Defense counsel immediately requested a bench conference, whereupon the following colloquy took place:

> "The Court: You asked the question.
>
> "Defense Counsel: My question didn't call for that answer.
>
> "The Court: I will instruct the jury on it. Do you want to move for a mistrial?

"Defense Counsel: Yes, sir.

"The Court: I will deny it and I will instruct the jury.

"The Court: Ladies and gentlemen of the jury, the last answer of the Officer concerning Peterson will be stricken from the record and the jury is not to consider it in any way, shape or form. The jury is to put it completely from their minds. It has nothing whatever to do with this case. Would you [to counsel] like anything further?

"Defense Counsel: No, Your Honor."

Clearly, it was unfortunate that such a statement was made. The witness was an experienced police officer with approximately seven years' assignment with the Gambling and Liquor Squad and, presumably, was not inexperienced in testifying in cases of this nature. Certainly, he should have known better. We have, of course, no way of telling whether the statement objected to was a slip of the tongue or whether it was an intended and calculated expression. If the latter, it would be inexcusable.

However, we think that, in light of the overwhelming evidence of guilt in this case, any prejudice which may have remained despite the judge's admonition to the jury may be said to be harmless. *Delli Paoli v. United States*, 352 U.S. 232 (1957); *Oppel v. United States*, 348 U.S. 84 (1954);[1] *Hopt v. Utah*, 120 U.S. 430 (1887), a capital case. That the jury was not blinded by this answer objected to is indicated by the fact that not all of the defendants were convicted.

We have examined the other contentions and find no error.

Affirmed.

[1] In *Hopt v. Utah*, 120 U.S. at page 438, the Supreme Court used the following language: "[I]ndependently of this consideration, as to the admissibility of the evidence, if it was erroneously admitted, its subsequent withdrawal from the case, with the accompanying instruction, cured the error. It is true, in some instances, there may be such strong impressions made upon the minds of a jury by illegal and improper testimony, that its subsequent withdrawal will not remove the effect caused by its admission; and in such cases the wronged defendant may avail on appeal or writ of error. But such instances are exceptional. The trial of a case is not to be suspended, the jury discharged, a new one summoned, and the evidence retaken, when an error in the admission of testimony can be corrected by its withdrawal. The presumption is that the jury will heed and disregard it. We think the present case one [illegible] [Citing cases.]"

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,627

September Term, 1959

Criminal 1126-58

JAMES R. CARTER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 15,628

September Terms, 1959

Criminal 1126-58

JOE S. FLUDD, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 15,629

September Term, 1959

Criminal 1126-58

JAMES M. HICKS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeals from the United States District Court for the District of Columbia.

Before: Bazelon, Bastian and Burger, Circuit Judges.

JUDGMENT

These appeals came on to be heard on the record on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this court that the judgments of the District Court appealed from in these cases are affirmed.

Per Curiam.

Dated: June 30, 1960.

Filed June 30, 1960. Joseph W. Stewart, Clerk.

FILE COPY

Supreme Court, U.S.
FILED
SEP 19 1960
JAMES R. BROWNING, Clerk

No. 350

In the Supreme Court of the United States

OCTOBER TERM, 1960

JAMES R. CARTER, JOE S. FLUDD, AND JAMES M. HICKS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
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MALCOLM RICHARD WILKEY,
Assistant Attorney General,
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In the Supreme Court of the United States

OCTOBER TERM, 1960

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JAMES R. CARTER, JOE S. FLUDD, AND JAMES M. HICKS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported (R. 123–126; Pet. App. 21–23).

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1960 (R. 127; Pet. App. 24). On August 1, 1960, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including August 20, 1960, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the petitioners were denied due process by the court's instructions, in the language of the statute, that unexplained possession of lottery paraphernalia was prima facie evidence of their participation in the operation of a lottery.

2. Whether there was probable cause for the arrest and search of the petitioners.

3. Whether the petitioners were prejudiced by the statement of a witness that a co-defendant under the indictment had entered a plea of guilty where the court immediately thereafter instructed the jury that it was not to consider this testimony in any way.

STATUTES INVOLVED

Title 22 D.C. Code § 1501 provides:

> Lotteries—Promotion—Sale or possession of tickets.—If any person shall within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting, or advertising, directly or indirectly, any policy lottery, policy shop, or any lottery, or shall sell or transfer any chance, right, or interest, tangible or intangible, in any policy lottery, or any lottery or shall sell or transfer any ticket, certificate, bill, token, or other device, purporting or intended to guarantee or assure to any person or entitle him to a chance of drawing or obtaining a prize to be drawn in any lottery, or in a game or device commonly known as policy lottery or policy or shall, for himself or another person, sell or transfer, or have in his possession for the purpose of sale or trans-

fer, a chance or ticket in or share of a ticket in any lottery or any such bill, certificate, token, or other device, he shall be fined upon conviction of each said offense not more than $1,000 or be imprisoned not more than three years, or both. The possession of any copy or record of any such chance, right, or interest, or of any such ticket, certificate, bill, token, or other device shall be prima-facie evidence that the possessor of such copy or record did, at the time and place of such possession, keep, set up, or promote, or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or advertising a policy lottery, policy shop, or lottery.

Title 22 D. C. Code § 1502 (1951 Edition, Supp. VIII) provides:

Possession of lottery or policy tickets.

If any person shall, within the District of Columbia, knowingly have in his possession or under his control, any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing, current or not current, used or to be used in violating the provisions of sections 22–1501, 22–1504, or 22–1508, he shall, upon conviction of each such offense, be fined not more than $1,000 or be imprisoned for not more than one year, or both. For the purpose of this section, possession of any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing shall be presumed to be knowing possession thereof.

Title 22 D.C. Code § 1505 (1951 Edition, Supp. VIII) provides:

Permitting gaming table or device to be set up.—(a) Any house, building, vessel, shed, booth, shelter, vehicle, enclosure, room, lot, or other premises in the District of Columbia, used or to be used in violating the provisions of section 22–1501 or 22–1504, shall be deemed "gambling premises" for the purpose of this section.

(b) It shall be unlawful for any person in the District of Columbia knowingly, as owner, lessee, agent, employee, operator, occupant, or otherwise, to maintain or aid or permit the maintaining of any gambling premises.

* * * * * *

(d) Whoever violates this section shall be imprisoned not more than one year or fined not more than $1,000, or both, unless the violation occurs after he has been convicted of a violation of this section, in which case he may be imprisoned for not more than five years, or fined not more than $2,000, or both.

STATEMENT

A seven-count indictment filed in the United States District Court for the District of Columbia charged the petitioners and two others with violation of District of Columbia lottery laws (R. 7–8). All three petitioners were named in count one as having promoted the numbers game in violation of 22 D.C. Code 1501. In addition, petitioner Carter was charged in count two with maintaining gambling premises (22 D.C. Code 1505) and in count three with possession of lottery tickets (22 D.C. Code 1502), and petitioners Fludd and Hicks in counts

four and six, respectively, with possession of lottery tickets (22 D.C. Code 1502). After a jury trial, the petitioners were found guilty on each of the counts under which they were charged (R. 10).[1] Each was sentenced to imprisonment of from nine months to twenty-seven months on count one, the promotion count. Each was sentenced under the other counts to imprisonment for nine months to run concurrently with the promotion count[2] (R. 11, 12, 13). The court of appeals affirmed (Pet. App. 21–24).

A

THE EVIDENCE

At trial, the government presented evidence of the following facts:

In September, 1958, officers of the District of Columbia Gambling Squad began surveillance of a basement shoe shine parlor-variety store (operated by petitioner Carter (R. 54)), after having received complaints of gambling activities taking place there (R. 18). After several weeks of observation by the police during which gambling paraphernalia and activity were seen; the police obtained a search warrant for the premises and arrest warrants for three individuals not involved in this petition (R. 2–7, 20–25).

---

[1] With respect to the other two persons named in the indictment, one Yancey Peterson entered a plea of guilty prior to trial. The other, Phillip Fludd, was acquitted by the jury on one count and two other counts were dismissed (R. 122).

[2] As to petitioner Carter, the nine-month sentence was generally imposed for counts 2 and 3.

On September 26 at 2:30 p.m. Lieutenant Foran, approaching the rear door of the premises with three other policemen, yelled "Police. We have a search warrant for gambling violations" (R. 50). As the officers entered the open rear door (R. 73), petitioner Carter was seen standing at a desk just inside a doorway or "divider" leading to a middle room (R. 57, 74).

A police sergeant executed the search warrant and arrested Mr. Carter (R. 3, 28). From his person the police seized $20.56 in cash (R. 29, 81), a notebook containing numbers bets (R. 29, 58, 59, 61), several numbers "cut cards" (R. 30, 61, 62) and slips of paper bearing numbers bets (R. 30, 61, 62). From the desk near where Mr. Carter was standing, the police recovered a number of coin envelopes bearing writers' codes and amounts of money, a tablet containing number bets recorded in duplicate, and pieces of paper bearing number bets (R. 31, 61, 64). Lottery items were also found in the pocket of a coat on the premises and from trash in the rear room (R. 40, 54).

Upon entering, Lieutenant Foran immediately went through the premises to the front where the business shop was located. There were two officers there who had entered by the front door (R. 51). There were also two other persons. These persons were not arrested (R. 32, 76). Lieutenant Foran instructed the officers not to bother anyone coming in unless such person came to the door leading to the rear of the premises (R. 52). Returning to the rear rooms, the lieutenant closed this door and instructed

the officers there that the door was to remain closed (R. 51–52, 75).

The officers remained in the back rooms approximately an hour (R. 76). During this period of time some eighteen persons, who had entered the premises at varying times, were placed under arrest and searched in the rear rooms (R. 47).

Petitioner Hicks was arrested at 2:40 p.m. when, according to the government's evidence, he entered the rear room from an alley through the rear door (R. 43, 45). From his pocket, the police recovered $23.00 in cash (R. 37, 38, 81) and a large quantity of numbers slips bearing bets (R. 38, 61, 65).

Petitioner Joe Fludd was arrested at 3:05 p.m. when, as government witnesses testified, he entered the rear room through the rear alley door (R. 52, 53, 77). A total of $140.41 was found in his pockets (R. 52–53, 81). On his person also were an address book on which were recorded number bets, a collection list bearing codes and amounts of money and three "cut cards" (R. 53, 61, 67, 71–72). Certain of the codes found on the collection list matched the code designations on some of the number slips found in the trash (R. 53, 71).

Petitioners Hicks and Fludd were the only two persons to enter the premises by the rear door (R. 77).

B

THE MOTION TO SUPPRESS

Prior to trial, a motion to suppress, made by petitioners Fludd and Hicks, was denied.[2] At trial the legality of the search and the arrests was again attacked. The court, granting a hearing out of the presence of the jury, heard testimony from all of the defendants including the following testimony pertinent here:

Petitioner Fludd said he entered the shop from the front entrance to get a coca cola. Once inside, he said, an officer ordered him through a connecting door to the rear where he was searched and items taken from his person (R. 86–88).

Petitioner Hicks said he entered the shop from the front to get a shoe shine, and was taken to the rear where he was searched and items taken from his person (R. 91–92).

Two other persons testified that they entered the shop at times varying between 2:00 and 3:30 that day. One said he came for a drink, the other a shoe shine. Both said they were ushered to the rear and searched. One estimated there were 30 people in the rear room, the other 20 to 25. Both said they were taken to police headquarters, photographed or fingerprinted and then released (R. 93–95).

At the conclusion of the testimony the court denied the motion.

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[2] While this fact does not appear in the record before this Court, reference is made to it in the original trial transcript (Tr. 257). The prior motion and order of denial are on file in the district court.

C

THE INSTRUCTIONS

In its charge to the jury, the court instructed at length as to the presumption of innocence and the burden of the government to prove the defendants guilty beyond a reasonable doubt (R. 107–108). As to the specific charge of operating a lottery, the court instructed (R. 110–111):

> In order to convict on this charge, the law does not require actual proof that the defendant was operating or participating in the operation of a lottery. The law provides as follows:
>
> "The possession of any copy or record of any such chance, certificate, right, or interest, or of any such ticket, certificate, bill, token or device shall be prima facie evidence that the possessor of such copy or record did at the time and place of such possession keep, set up or promote or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting or advertising a policy lottery, policy shop, or lottery."
>
> In other words, if it is shown that a defendant has numbers slips or other records relating to a lottery in his possession, that constitutes evidence that he participated in operating the lottery, unless there is proof to the contrary.
>
> Consequently, the jury has a right to find a verdict of guilty on a charge of operating the lottery from the fact that a person is found in possession of numbers slips or any other records of the lottery, unless the contrary is shown.

At the conclusion of the instructions defense counsel objected, *inter alia*, that the manner of charge with

respect to the prima facie evidence rule had caused a shifting of the burden of proof (R. 113).

After the jury had deliberated for some time, it asked for the District of Columbia Code provisions. Over objection, the court repeated its instructions with respect to the specific charges (R. 118–119). At the request of defense counsel, it repeated its instruction as to burden of proof (R. 120–121).

ARGUMENT

1. The petitioners contend that the court improperly instructed the jury as to the inference to be given the possession of lottery materials in determining guilt of the operation of a lottery under 22 D.C. Code 1501 (pp. 2–3, *supra*). This provision makes such unexplained possession prima facie evidence that the possessor was concerned in promoting a lottery. The instruction complained of was no more than a reading of the statutory language verbatim and a few carefully chosen words of explanation. The court merely restated that a showing that a defendant had such records was evidence and that consequently a jury "has a right" to find a verdict of guilty on such evidence unless the contrary is shown. This explanation gave the presumption only the force and effect that Congress intended. It could not have given the jury, as the petitioners imply, the impression that it must convict. The jury knew that it had the alternative of acquitting on this or any other evidence; it was fully informed as to the presumption of innocence and the burden of the government to prove guilt beyond a reasonable doubt.

Since the court's instruction was a fair restatement of the statutory language, the petitioners' contentions, in effect, amount to an indirect attack on the constitutionality of the statute itself. But statutory presumptions making possession of a prohibited article prima facie evidence of guilt, where there is, as here, a rational connection between the fact proved and the fact permitted to be inferred, have long been upheld by this Court. See *Yee Hem* v. *United States*, 268 U.S. 178. This Court has found it consistent with all constitutional protections to place on an accused the burden of explaining or justifying facts peculiarly within his knowledge. *Casey* v. *United States*, 276 U.S. 413, 418.

In *Maynard* v. *United States*, 215 F. 2d 336 (C.A.D.C.), the statute here in question was considered, against allegations almost identical, and under facts very similar, to those in the instant case. The Court of Appeals for the District of Columbia, citing *Yee Hem*, said (215 F. 2d at 341):[1]

> It is clear to us that the inference permitted by the statute in nowise impinged upon the over-all requirement as the trial judge charged, that the jury must find, on the whole case, that every element of the offense had been established beyond a reasonable doubt. It was within the province of the jury to take into account the permitted inference as it considered its verdict.

---

[1] The court also rejected the contention that the same evidence was used to convict on both possession and operation of a lottery noting (215 F. 2d at 340): "Two separate offenses are clearly defined." See also *Davis* v. *United States*, 274 F. 2d 585 (C.A.D.C.).

Here the petitioners were shown to have possession of lottery records on lottery premises. They chose not to explain this possession. They have no cause now for complaint.

2. Petitioners Hicks and Fludd complain that their arrest and the subsequent search of their persons were in violation of their rights under the Fourth Amendment. The facts do not support their position.

There is no question here that the officers were properly on the premises where the arrests took place in the execution of a valid search warrant. The only issue is whether the officers as prudent men had probable cause to believe that the petitioners were, or had been, committing an offense. *Brinegar* v. *United States*, 338 U.S. 160, 175; *Henry* v. *United States*, 361 U.S. 98, 102.

In similar lottery cases arising in the District of Columbia, the court of appeals has held that officers are justified in inferring that all persons present or entering a numbers lottery rendezvous at the time of day when bets are assembled are probably participants in the game. *Wyche* v. *United States*, 193 F. 2d 703, certiorari denied, 342 U.S. 943; *Stephens* v. *United States*, 271 F. 2d 832. The facts of this case do not justify a departure from this inference for, in the light of the circumstances surrounding the arrests of Messrs. Fludd and Hicks, the fact that a licensed public parlor was a "front" for the rendezvous is immaterial.

The testimony of the officers was that these petitioners entered the basement by the rear door. This is in itself significant. Customers on legitimate business do not enter a shop by the rear unless a public entrance is provided there. Moreover it is clear that the officers knew that the illegal lottery activity was centered in the rear rooms just inside the back door. Thus the supervising officer testified that he instructed that no persons coming into the shop were to be apprehended unless they sought to enter the rear. It was in these rooms that the officers had seized gambling paraphernalia just prior to the entrance of Messrs. Hicks and Fludd. It was there that some few days previously at the same time of day one of the officers had observed number slips lying in full view on a desk and a person writing bets thereon (R. 24–25). The rooms were so small that any such activity would of necessity be clearly discernible to anyone passing through this part of the premises. Under these circumstances it was reasonable to infer that any persons entering the rear door at this time of day would in some way be connected with the numbers game. The officers had probable cause for the arrest and subsequent search of the petitioners.

3. The court below properly rejected the petitioners' contention that they were prejudiced at trial by the remark of a government witness that a codefendant had entered a plea of guilty earli[1] in the case.[1] When the statement complained of was

[1] The circumstances surrounding the error complained of are detailed in the opinion of the Court of Appeals (Pet. 22–23).

made, the trial court immediately gave an admonition to the jury to disregard completely what he described as having nothing at all to do with the case. This fact, and the fact that the remark could not have influenced a verdict supported by corroborated and uncontradicted evidence that the petitioners were carrying on their persons lottery paraphernalia, properly formed a basis for the conclusion below that the error was harmless.* See *Delli Paoli* v. *United States*, 352 U.S. 232; *Opper* v. *United States*, 348 U.S. 84; *Hopt* v. *Utah*, 120 U.S. 430. It is significant, as the court below noted, that the jury did not convict all the defendants.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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BEATRICE ROSENBERG,
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Attorneys.

SEPTEMBER 1960.

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*The cases cited by the petitioners are distinguishable as involving situations of compounded or overall prejudice, as for example where the court improperly alluded to guilty pleas of co-defendants or co-conspirators accepted in the presence of the jury, or instructed that the jury might take into consideration such pleas in arriving at a verdict. See *United States* v. *Toner*, 173 F. 2d 140 (C.A. 3); *United States* v. *Hall*, 178 F. 2d 853 (C.A. 2); *Payton* v. *United States*, 222 F. 2d 794 (C.A.D.C.).

U.S. GOVERNMENT PRINTING OFFICE: 1960